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In the Supreme Court of the United States

October Term, 1983

SHELDON STEIN,
Petitioner,

vs.

ANGELO GAGLIARDO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a District Court was precluded by the abstention doctrine of *Younger v. Harris* from considering an action for declaratory judgment and injunctive relief filed pursuant to 42 U.S.C. Section 1983 where state quasi-criminal proceedings are threatened but not actually commenced.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I
TABLE OF AUTHORITIES III
CITATION TO OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTION AND STATUTES INVOLVED 2
STATEMENT OF FACTS 3
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 12
RELIEF ULTIMATELY SOUGHT 13

APPENDIX:

Opinion and Order of the United States Court of Appeals for the Sixth Circuit (January 25, 1984) A1
Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division (June 24, 1983) A2
Ohio Code of Professional Responsibility (excerpts) A7
Yellow Pages Advertisement A17
Mailed advertisement A18
Letter to Sheldon Stein from Carl Corletzi and Angelo Gagliardo, dated April 25, 1983 ..... A19
Letter to Carl Corletzi from Sheldon Stein, dated May 5, 1983 ..... A21
Letter to Sheldon Stein from Carl Corletzi, dated May 16, 1983 ..... A26
Letter to Carl Corletzi from Sheldon Stein, dated June 1, 1983 ..... A28
Letter to Sheldon Stein from Angelo Gagliardo, dated June 3, 1983 ..... A30

TABLE OF AUTHORITIES

Cases

Bates v. Arizona, 433 U.S. 350 (1977) 4, 5, 9
Bolger v. Youngs Drug Products Co., ... U.S. ...., 77 L. Ed. 2d 469 (1983) 9
Colorado River District v. United States, 424 U.S. 809 (1976) 7
Ex Parte Garland, 71 U.S. (4 Wall) 333 (1866) 8
In Re R.M.J., 455 U.S. 191 (1982) 4, 5
In Re Ruffalo, 390 U.S. 544 (1967) 8
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) 6, 7, 11, 12
Moore v. Sims, 442 U.S. 415 (1979) 7, 8
Steffel v. Thompson, 415 U.S. 452 (1974) 8, 9, 10, 12
Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir., 1980) 7
Younger v. Harris, 401 U.S. 37 (1971) 6, 7, 8

Constitutional Provisions

U.S. Const., Amend. I 2, 4, 5, 6, 9, 10, 11

Statutes

42 U.S.C. 1983 ..... 2, 3, 6, 10
Ohio Code of Professional Responsibility 3, 4, 9, 11

No.

In the Supreme Court of the United States

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SHELDON STEIN,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 25, 1984.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. The opinion is set forth in the Appendix at page A1.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported as of this date. The opinion is set forth in the Appendix at page A2.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Ohio Code of Professional Responsibility

(Excerpts)

Relevant sections are set forth in the Appendix at A7.

STATEMENT OF FACTS

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. 1983 by Sheldon Stein ("Stein"), petitioner herein. Stein is an attorney and a member of the bar of the State of Ohio. Respondent, Angelo Gagliardo ("Gagliardo"), is an attorney employed by the Ohio Supreme Court to prosecute alleged violations of the Ohio Code of Professional Responsibility by attorneys in Ohio. He has no power to adjudicate or determine constitutional challenges to these regulations.[1]

Stein published an advertisement in the Cleveland, Ohio, Yellow Pages. The format of the advertisement was prepared by the American Bar Association and distributed to lawyers throughout the United States. The advertisement informs people with debt problems of the availability of debt relief programs from which they might benefit, and invites such persons to call for further information. The advertisement is reproduced at page A17 of the Appendix.

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1. This is confirmed in a letter from Gagliardo to Stein, dated June 3, 1983, in which Gagliardo writes: "[T]his office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited . . . [to investigate and thereafter] . . . file a complaint with The Board of Commissioners on Grievances and Discipline." (App., p. A30).

From time to time, Stein also mailed copies of his advertisement to people whom he believed might benefit from legal services because of pressing financial problems. A copy of the document mailed is reproduced at page A18 of the Appendix.

On April 25, 1983, Gagliardo wrote to Stein, asserting that the contents of the advertisement, although truthful and nondeceptive, violated a provision of the Ohio Code of Professional Responsibility pertaining to legal advertising, and further asserting that the mailing of the advertisement violated the anti-solicitation provisions of the Ohio Code of Professional Responsibility, which bans all direct mail contact by attorneys. According to Gagliardo, the Supreme Court of Ohio had ". . . not amended any of the rules in the Ohio Code of Professional Responsibility pertaining to advertising" despite this Court's decisions in *Bates v. Arizona*, 433 U.S. 350 (1977) and *In Re R.M.J.*, 455 U.S. 191 (1982). Gagliardo said that he intended to seek enforcement of the Code *as written*, and instructed Stein to cease such activity and to advise ". . . [b]y written statement within ten (10) days . . . of [his] intention to comply with the Code of Professional Responsibility." This letter is reproduced at page A19 of the Appendix.

On May 5, 1983, Stein responded to Gagliardo's letter. In his response, reproduced at page A21 of the Appendix, Stein pointed out that the holdings in *Bates* and *R.M.J.*, as well as various subsequent decisions from lower courts, clearly established that his conduct was protected First Amendment activity, and further noted that these cases rendered various portions of the Ohio disciplinary code unconstitutional and invalid.

Gagliardo responded by letter dated May 16, 1983. He again told Stein that unless he ceased the protected First

Amendment activity, Gagliardo would file disbarment proceedings against him. This letter is reproduced at page A26 of the Appendix.

It was now clear that Gagliardo was aware of the invalidity of portions of The Ohio Disciplinary Code, but that he nevertheless intended to use the threat of disbarment proceedings to coerce Stein into ceasing protected First Amendment activity. On June 1, 1983, Stein again wrote to Gagliardo and asked him to reconsider his position in light of the obvious conflict between the decisions of this Court in *Bates* and *R.M.J.* and Ohio's disciplinary regulations. A copy of this letter is reproduced at page A28 of the Appendix.

Gagliardo remained intractable. In a letter dated June 3, 1983, and found at page A30 of the Appendix, he again told Stein he would begin disbarment proceedings against him within five (5) days unless Stein agreed to cease his protected First Amendment activity.

At this point Stein was faced with a Hobson's choice. Gagliardo was attempting to coerce Stein into foregoing protected First Amendment activity by threatening to begin disbarment proceedings against him. The disciplinary regulations upon which Gagliardo based his threats were obviously invalid and unconstitutional; yet there were no pending state judicial proceedings in which Stein could raise a challenge to the disciplinary regulations and Gagliardo's threats. Stein was left with the choice of continuing his constitutionally-protected activity and risking disbarment, or ceasing the activity in the face of an illegal threat. Simply put, Gagliardo was using the threat of disciplinary proceedings to coerce compliance with blatantly unconstitutional disciplinary regulations.

On or about June 9, 1983, Stein filed this action in the United States District Court, Northern District of Ohio, Eastern Division, pursuant to 42 U.S.C. 1983, seeking a declaratory judgment, *inter alia,* that his conduct was protected by the First Amendment, and an order restraining Gagliardo from enforcing the unconstitutional regulations.

The District Court, on or about June 24, 1983 dismissed this case based upon the abstention doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982). The essence of the District Court's decision was that the court should abstain from exercising jurisdiction because of a "pending state judicial proceeding" concerning the same matters. See Appendix, pages A2, *et seq.* At the time of the dismissal, however, Gagliardo had taken no action against Stein, other than writing the letters referred to above and threatening him. No state judicial proceedings were pending in which Stein could raise his constitutional claims. Indeed, no state judicial proceedings were pending of any kind.

Stein appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals rendered its decision on January 25, 1984, affirming the District Court. From the decision of the United States Court of Appeals for the Sixth Circuit, Stein seeks certiorari to this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The *Younger v. Harris* federal abstention doctrine was born out of concern that Federal Court injunctions might unduly hamper states in their prosecution of criminal law violations. *Younger, supra,* at 51-2. The basic premise of *Younger* abstention is a strong policy against the disruption of pending state judicial proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association, supra.* This Court has extended abstention to non-criminal judicial proceedings where important state issues are involved. *Moore v. Sims,* 442 U.S. 415, 423 (1979).

Nevertheless, federal courts generally have an "unflagging obligation" to exercise their jurisdiction. *Tovar v. Billmeyer,* 609 F.2d 1291, 1293 (9th Cir., 1980). "This obligation is particularly weighty when those seeking a hearing in Federal Court are asserting their right to relief under 42 U.S.C. 1983." *Id.,* at 1293. Although *Younger* and its progeny declare that the principles of federalism and comity sometimes offset this obligation to entertain civil rights suits, the abstention doctrine remains "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River District v. United States,* 424 U.S. 809, 813 (1976).

Where vital state interests are at stake, Federal Courts generally abstain from disrupting pending state proceedings unless the constitutional claims cannot be litigated. "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the con-

stitutional claims. . ." *Moore v. Sims, supra,* at 430. Conversely, the *Younger* doctrine does not apply where state judicial proceedings are threatened but have not been commenced. This is because no forum exists in which the constitutional claims can be raised. *Steffel v. Thompson,* 415 U.S. 452 (1974).

In *Steffel,* this Court held that the *Younger* abstention was inapplicable where proceedings are merely threatened, because considerations of equity, comity, and federalism "have little force in the absence of pending state proceedings." *Id.,* at 462. One should not have to choose between the "Scylla of intentionally flouting state . . . [law] and the Charybdis of foregoing what [they] believe to be constitutionally protected activity." *Ibid.*

The decisions of the District Court and the Court of Appeals in this action conflict with *Steffel.* Although *Steffel* concerned a threatened criminal proceeding, and this case concerns a threatened quasi-criminal proceeding[2], they are otherwise indistinguishable. In both cases the litigants faced the threat of terrible punishment in spite of claims that their activity was constitutionally protected. In both cases they were forced to seek redress in Federal Court to avoid the Hobson's choice between intentionally flouting state law (and thereby raising their constitutional claims only in the face of terrible punishment) or foregoing constitutionally protected conduct. In neither case was a state judicial proceeding pending in which the litigants could raise their constitutional claims.[3]

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2. Disbarment proceedings are quasi-criminal in nature, *In Re Ruffalo,* 390 U.S. 544, 551 (1967), as they are "a punishment or penalty imposed on a lawyer." *Ex Parte Garland,* 71 U.S. (4 Wall) 333, 380 (1866).

3. As the record in this case demonstrates, Gagliardo had threatened to begin disbarment proceedings against Stein, but

(Continued on following page)

The only real difference between *Steffel* and this case is the result. This conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW CREATE A SIGNIFICANT AND SERIOUS IMPEDIMENT TO THE FREE EXERCISE OF PROTECTED FIRST AMENDMENT ACTIVITY.

This case concerns constitutional issues affecting attorneys practicing law in all fifty (50) states. In a series of decisions beginning with *Bates v. Arizona, supra,* and ending with *Bolger v. Youngs Drug Products Co.,* ..... U.S. ....., 77 L. Ed. 2d 469 (1983), this court has clearly established that certain forms of advertising by attorneys are protected by the First Amendment. Nevertheless, old notions die a slow death, and the traditional opposition to legal advertising by some members of the Bar is no exception. The decisions of the District Court and the Court of Appeals below pose a serious threat to any attorney wishing to advertise in a state, such as Ohio, where state authorities are determined to limit the ability to advertise by enforcing disciplinary rules which predate *Bates v. Arizona* and its progeny, and which are blatantly unconstitutional.

This Court has never required individuals to forego what they believe to be constitutionally-protected activity, when faced with the threat of terrible punishment if such conduct continued. Nor has it ever required an in-

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Footnote continued—

had not done so at the time suit was filed or when the case was dismissed. In his letter to Stein, dated June 3, 1983, Gagliardo confirms that he serves a prosecutorial function, and that he has no power to adjudicate constitutional challenges to the Ohio Code of Professional Responsibility. See Note 1, *supra*. This letter is reproduced on page A30 of the Appendix.

dividual to intentionally flout state law to obtain a judicial determination of the constitutionality of the activity in issue. *Steffel v. Thompson, supra.* Yet, the decisions of the courts below will have such an effect.

The decisions of the Court of Appeals and the District Court preclude injunctive and declaratory relief pursuant to 42 U.S.C. 1983 where state disciplinary proceedings have not been commenced, only threatened. Thus, a state disciplinary officer in any of the fifty (50) states can effectively prevent an attorney from engaging in protected First Amendment activity by *threatening* to begin disbarment proceedings, thereby leaving the attorney with the unenviable choice of continuing protected conduct and facing the professional and personal stigma of disbarment proceedings, or knuckling under to the unconstitutional threats of the state disciplinary officer by curtailing First Amendment activity that this Court has already held to be proper. Given such a choice, many attorneys will surely cease protected activity because they cannot otherwise obtain a judicial determination as to the propriety of the activity in question, and do not wish to risk losing their license to practice law in disbarment proceedings, where such a determination could be had. Only an action for declaratory and injunctive relief pursuant to 42 U.S.C. 1983 protects the rights of all concerned by permitting a judicial resolution of the controversy, while eliminating the possibility of an unconstitutional result obtained extra-judicially through the use of unconstitutional threats.

These are the only Circuit Court and District Court decisions which have addressed this question. Consequently, these decisions, if permitted to stand, would provide encouragement and authority for the disciplinary officer in any of the fifty (50) states to unconstitutionally restrict advertising which this Court has specifically and

clearly authorized as constitutionally protected First Amendment expression. This tension with clearly established legal principles justifies the grant of certiorari to review the judgment below.

3. THE DECISIONS BELOW IGNORE THE UNDISPUTED FACTS OF THIS CASE.

Lastly, the decisions of the Court of Appeals and the District Court below ignore the undisputed facts of this case. The record clearly demonstrates that Gagliardo, being only the Ohio Disciplinary Counsel, serves a prosecutorial function—in that he prosecutes attorneys who allegedly violate the Ohio Code of Professional Responsibility. He has no power to adjudicate constitutional challenges to these disciplinary regulations. In a letter to Stein dated June 3, 1983 (App., p. A30), Gagliardo clearly and succinctly enunciated his function: "[T]his office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited . . . [to investigate and thereafter] . . . file a complaint with the Board of Commissioners on Grievances and Discipline."

At the time that Stein filed suit in District Court, the only action that Gagliardo had taken was to advise Stein in writing that he would file disbarment proceedings unless Stein agreed to cease what he believed to be constitutionally protected First Amendment expression. No formal complaint had been filed by Gagliardo with the Ohio Board of Commissioners on Grievances and Discipline.

Based upon these uncontroverted facts, the District Court and the Court of Appeals abstained from deciding this case upon its merits, relying upon *Middlesex County Ethics Committee v. Garden State Bar Association, supra.*

In *Middlesex County Ethics Committee*, this Court held that abstention was proper only where the federal suit was filed *after* state disciplinary proceedings had begun.

The lower court's decisions in this case make no mention of *Steffel v. Thompson, supra*, wherein this Court held that a District Court *cannot* abstain from exercising jurisdiction where state judicial proceedings are merely threatened.

Given that state disbarment proceedings were only threatened when Stein filed suit, it would appear that *Steffel*, and not *Middlesex*, controls the disposition of this case. The refusal of the Circuit Court and the District Court to respect these uncontroverted facts, in light of *Steffel*, cannot be justified.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

RELIEF ULTIMATELY SOUGHT

Petitioner believes that this Court should rule that the District Court improperly abstained from deciding this case upon the merits, and that the decisions of the Court of Appeals and the District Court must, therefore, be reversed, with instructions to hear and determine this cause.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 25, 1984)

No. 83-3453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELDON STEIN,
Plaintiff-Appellant,

vs.

ANGELO GAGLIARDO,
Defendant-Appellee.

ORDER

BEFORE: EDWARDS, MERRITT and JONES, *Circuit Judges.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and IT IS THEREFORE ORDERED that said judgment be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 24, 1983)

C83-2415

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHELDON STEIN,
Plaintiff,

vs.

ANGELO GAGLIARDO,
Defendant.

MEMORANDUM AND ORDER

Plaintiff, an attorney and member of the bar of the State of Ohio, has caused an advertisement for legal services to be placed in the Cleveland, Ohio Yellow Pages concerning the availability of legal services for individuals with financial problems. On April 25, 1983 the Defendant, Disciplinary Counsel of the Supreme Court of Ohio, advised plaintiff that this advertisement violated Rule 2-101(B) of the Ohio Code of Professional Responsibility and indicated that disciplinary action would be commenced unless plaintiff voluntarily discontinued use of the advertisement. After receiving plaintiff's reply that he believed that this advertisement was [2] a form of commercial speech protected by the First Amendment to the United

States Constitution, defendant again notified plaintiff that disciplinary action would be commenced within five (5) days unless plaintiff agreed to stop using the advertisement. Plaintiff has also sent a copy of the Yellow Pages advertisement to selected individuals whom it was believed could benefit from the receipt of the information. The defendant's letter of April 25, 1983 contained notice that mailing of this advertisement constituted a violation of Rule 2-103 and 2-104 of the Ohio Code of Professional Responsibility. The plaintiff's reply and defendant's following letters also applied to the mailed advertisement.

Plaintiff has commenced this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 seeking an order enjoining defendant from enforcing Rules 2-101(B), 2-103 and 2-104 against plaintiff and a declaratory judgment that the enumerated rules be found unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This matter is before the Court upon plaintiff's motion for a temporary restraining order and defendant's motion to dismiss for lack of jurisdiction. At the hearing on the motions the Court overruled defendant's motion to dismiss as it pertained to the issue of improper venue under 28 U.S.C. §1391(b). **[3]** Defendant then raised the issue of abstention according to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The *Younger* case established a doctrine of equitable restraint whereby the federal courts restrain from interfering with pending state judicial proceedings absent extraordinary circumstances. Recently the United States Supreme Court applied the *Younger* doctrine to a state disciplinary proceedings against an attorney in *Middlesex County Ethics Committee v. Garden State Bar Association* ..... U.S. ....., 102 S.Ct. 2515, 73 L.Ed. 2d 116 (1982). The

Court set forth three (3) criteria to be used in determining whether to apply the abstention doctrine to a state disciplinary proceeding. First, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Under Ohio law, the Ohio Supreme Court has the exclusive and absolute authority over attorney disciplinary proceedings. Article IV §§2(B)(1)(g), 5(B) of the Ohio Constitution, *Smith v. Kates*, 46 Ohio St 2d 263, 348 NE 2d 320 **[4]** (1976). The Supreme Court Rules for the Government of the Bar of Ohio make the Code of Professional Responsibility binding on attorneys and provides a disciplinary procedure for violations. (Gov. R. IV and V). The position of Disciplinary Counsel has been created by the Ohio Supreme Court. According to Gov. R. V the Board of Commissioners, also created by the Supreme Court, receives complaints of misconduct and may refer any matters coming to its attention to the Disciplinary Counsel for investigation. All complaints alleging violations of DR 2-101 must be referred to the Disciplinary Counsel for investigation, filing of formal complaint and prosecution of the formal complaint. The process begins when the Board of Commissioners receives the initial complaint of misconduct and refers it to the Disciplinary Counsel who begins investigation. Therefore the Ohio disciplinary procedure must be considered part of the ongoing judicial proceedings of the Ohio Supreme Court. See *Coogan v. Cincinnati Bar Association*, 431 F. 2d 1209 (6th Cir. 1970).

The second criteria under *Middlesex County*, is that an important state interest must be implicated. The State

of Ohio recognizes the importance of regulating the practice of law. The Ohio Constitution grants the Ohio Supreme Court the jurisdiction to regulate admission to the practice of law, [5] enforce discipline among members of the bar, and all other matters relating to the practice of law including registration of attorneys. (Art. IV §2(B)(1)(g) of the Ohio Constitution, Gov. R. VII). In addition, the State's interest is demonstrated by the fact that the Disciplinary Counsel of the Ohio Supreme Court is named as a party in this case.

Finally, there must [sic] an adequate opportunity in the state proceeding to raise constitutional questions. According to Gov. R. V, upon receipt of the Commissioner's report, the Supreme Court issues an order to the respondent attorney to show cause why the report should not be confirmed. The Respondent then has twenty (20) days to object to the Commissioner's recommendations. When timely objections are filed the Supreme Court conducts a hearing wherein the respondent is given an opportunity to raise constitutional challenges. *Cleveland Bar Association v. Pleasant*, 167 Ohio St 325, 148 NE 2d 493 (1958). The Court finds that all the criteria set forth in *Middlesex County* are satisfied requiring this Court to abstain from determining the issues in this case.

Accordingly, the plaintiff's motion for temporary restraining order is DENIED. Defendant's motion to dismiss is GRANTED. The complaint is hereby dismissed.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 24, 1983)

C83-2415

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHELDON STEIN,
Plaintiff,

v.

ANGELO GAGLIARDO,
Defendant.

ORDER

Pursuant to the Court's Memorandum and Order filed June 24, 1983,

IT IS ORDERED that plaintiff's complaint is hereby dismissed at plaintiff's costs.

/s/ GEORGE W. WHITE
United States District Judge

OHIO CODE OF PROFESSIONAL RESPONSIBILITY

(Excerpts)

DISCIPLINARY RULES

DR 2-101. Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations and societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only names and addresses of references, and, with their written consent, names of clients regularly represented.

(C) If the advertisement is communicated to the public over radio or television, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(D) If a lawyer advertises a fee for a service, such service must be rendered for no more than the fee advertised.

(E) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information

authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(F) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(G) A lawyer shall not directly or indirectly compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

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DR 2-103. Recommendation of Professional Employment

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the

usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, assisting and providing legal services for, one of the following offices or organizations that promote the use of his services or those of his partner or associate

or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with

him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide therefor.

Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected or approved by the organization would be unethical, improper or inadequate under the circumstances of the matter involved; the plan shall provide for adjudication of such a claim and appropriate relief through substitution of counsel or through

providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by such counsel to the extent that such services are covered under the plan and in an amount equal to the cost which would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

DR 2-104. Suggestion of Need of Legal Services

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D) (1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR 2-105. Limitation of Practice

(A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR 2-102(A) (6) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation

"Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

(4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

* * * * *

If you're hopelessly overburdened by debts . . .

Can personal bankruptcy help you?

It might possibly be the answer. Individuals and couples can file for bankruptcy just as businesses can. If you qualify and are declared legally bankrupt, you are freed of most old debts and can have a fresh new start in life. A new law permits you to often keep your house and automobile and get a fresh start. Consult with us to learn if you are eligible. No cost or obligation.

SHELDON STEIN

ATTORNEY-AT-LAW

696-7449

1226 STANDARD BLDG
corner St Clair & Ontario
(Downtown across from Justice Center)

YOU'LL FIND US FAST IN YOUR CLEVELAND YELLOW PAGES

Bell System Yellow Pages

If you're hopelessly overburdened by debts . . .

Can personal bankruptcy help you?

It might possibly be the answer. Individuals and couples can file for bankruptcy just as businesses can. If you qualify and are declared legally bankrupt, you are freed of most old debts and can have a fresh new start in life. A new law permits you to often keep your house and automobile. Consult with us to learn if you are eligible. No cost or obligation.

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DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

April 25, 1983

PERSONAL & CONFIDENTIAL

Sheldon Stein, Esq.
1226 Standard Building
Cleveland, Ohio 44113

Re: MISC. 1983
Yellow Pages
Advertisement

Dear Mr. Stein:

Please be advised that this office in is receipt of your Cleveland Yellow Pages advertisement and your envelope to Ms. Joanne Knapp with your Yellow Pages advertisement enclosed. The use of advertisements should be examined in connection with the decisions of *Bates v. Arizona*, 51 Ohio Misc. 2d 1; 433 U.S. 350 (1977); *In the Manner of R.M.J.*, 102 S. Ct. 929; Disciplinary Rule 2-101(A)

and (B)(1) through (20); and Disciplinary Rule 2-103. The Supreme Court of Ohio has not amended any of the Rules in the Ohio Code of Professional Responsibility pertaining to advertising and related subjects in the Code. It is our view that the Ohio Code provisions are in full force and effect except those specific statements made by The Supreme Court of the United States in *Bates* and *R.M.J.*

Disciplinary Rule 2-101(B) lists the twenty items that may be published or broadcasted. It would seem that your advertisement does not comport with the advertisement criteria of Disciplinary Rule 2-101(B).

Furthermore, your Yellow Pages advertisement was mailed to Ms. Knapp without her request. The envelope shows bulk rate postage and your return address but without your name for the return address. The unsolicited mailing of your advertisement may be a violation of Disciplinary Rule 2-103 and Disciplinary Rule 2-104 and therefore should be carefully examined by you to see that there are no potential violations in the future.

Please advise this office by written statement within ten days of your receipt of this letter of your intentions to comply with the Code of Professional Responsibility. Thank you for your anticipated cooperation in this matter.

Very truly yours,

AJG
ANGELO J. GAGLIARDO
Disciplinary Counsel

By: /s/ Carl J. Corletzi
Carl J. Corletzi

CJC/sam

SHELDON STEIN
ATTORNEY AND COUNSELOR AT LAW
Suite 1226 - Standard Building
Post Office Box 5606
Cleveland, Ohio 44101

216 696-7449

May 5, 1983

Mr. Carl Corletzi, Esq.
State Disciplinary Counsel
175 South Third Street
Columbus, Ohio 43215

Re: Professional Advertising

Dear Mr. Carletzi:

This letter is in response to your letter of April 23, 1983, and our subsequent telephone conversation concerning same.

It has never been my intention to do anything which can be construed as being harmful to the general public, and, indeed, I have always conducted my practice according to the highest standards of our profession.

That is why I was dismayed to learn that a brother attorney, unhappy or perhaps jealous of the considerable amount of people I have counseled in the past year about debt problems, has seen fit to ask the disciplinary counsel to substantially limit my ability to disseminate information to the general public as to their legal rights.

I fully understand that old notions die a hard death. I also understand that rules and regulations concerning the practice of law are based upon ancient ideas. The traditional ban on advertising originated as a rule of etiquette

and not as a rule of ethics. Early lawyers viewed the law as a form of public service rather than as a means of earning a living, and looked down upon commercialism or "trade" as unseemly. Eventually, the attitude towards advertising fostered by this view evolved into an aspect of the ethics of the profession. *Bates vs. State Bar of Arizona*, 433 U.S. 350, 371 (1977). "Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." *Id.*, at 371-2. Indeed, the Supreme Court has recognized the importance that advertising plays in today's society ". . . [advertising] serves to inform the public of the availability, nature, **[2]** and prices of products and services, and thus plays an *indispensable* role in the allocation of resources in a free enterprise system. . . In short, such [advertising] serves individual and societal interests in assuring informed and reliable decision making. . ." *Bates vs. State Bar of Arizona, supra*, at 364.

Therefore, I was saddened to learn through your letter and our telephone conversation that you are questioning the propriety of my ad. It is truthful and nondeceptive and it fulfills a valuable function in advising the public of the availability of legal service.

The yellow pages advertisement has been in publication for over three years, and in all that time I have never received a complaint from the public or the organized bar that the ad was deceptive, misleading, or otherwise objectionable. To the contrary, many people have seen the ad in the yellow pages and in responding to same, have received competent legal advice. The response from fellow lawyers has been very favorable. I fail to see how anything which increases the public's awareness of their legal rights can be considered harmful.

Furthermore, the Ohio State Bar Association has for a long time provided pamphlets to attorneys for distribution and given them to the general public. These pamphlets describe the law in areas of consumer interest. There seems to be little reason to prohibit a lawyer from doing that which the Bar Association encourages.

Lastly, the ad is based upon a model advertisement furnished by the American Bar Association, (see enclosed). It is inconceivable that an objection could be raised to that which the American Bar Association *encourages* attorneys to make use of. I was only following in good faith the ethical guidelines promulgated by this organization.

It is beyond doubt that a state may not prohibit an attorney from advertising. In *Bates vs. State Bar of Arizona, supra,* the court held that lawyers advertising was a form of commercial speech protected by the First Amendment, and that "advertising by attorneys may not be subjected to blanket suppression." 433 U.S. at 383. Although *Bates* concerned newspaper **[3]** advertising, the court indicated that it applied with equal force to mail circulations: "The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to price advertisement in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means - for example, magazines, signs in buses and subways, posters, handbills, and *mail circulations.*" *Bates vs. State Bar of Arizona, supra,* at 402, fn. 12 (Powell, J., concurring.)

Thereafter, the court decided *In Re R.M.J.*, 455 U.S. 191 (1982), a case concerning the extent to which lawyer advertising may be regulated. The attorney in *R.M.J.* was the subject of disciplinary proceedings after having

sent an unsolicited advertisement to potential clients. The mailing was truthful and not misleading, yet violated the Missouri restrictions upon what could be placed in an advertisement. The court condemned as constitutionally impermissible the attempted state suppression of truthful advertising by mail.

R.M.J. gives a broad sweep of protection to the exercise of commercial speech by lawyers. Its message is clear: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proven that, in fact, such advertising is subject to abuse, the State may impose appropriate restrictions. Misleading advertising may be prohibited entirely. . . Although the potential for deception and confusion is particularly strong in the content of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent deception." 455 U.S. at 203.

The Supreme Court of Oklahoma summarized *R.M.J.* as follows: (1) Advertising inherently misleading or proven to be misleading in practice may warrant absolute state prohibition; (2) Non misleading advertising may be regulated only where a substantial state interest exists. See *State, ex rel. Oklahoma Bar Association vs. Schaffer*, 648 P. 2d, 355 (Okl., 1982) See, also, *Disciplinary Proceedings Against Markus*, 320 N.W. 2d 806 (Wisc. 1982).[1]

[4] Your attention is respectfully directed to the case of *Kentucky Bar Association vs. Stuart*, 568 S.W., 2d 933 (Ky., 1978) and the very learned decision of the New York

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1. The advertisement approved by the Wisconsin Supreme Court in *Markus* was much more egregious than mine. It is attached as Exhibits "B" and "C".

high court in *Koffler vs. Joint Bar Association*, 421 N.E. 2d 927 (N.Y., 1980), both of which approved nondeceptive direct mail advertising by attorneys.

My advertising which currently appears in the yellow pages is neither misleading nor deceptive. Based upon *Bates* and *R.M.J.*, its publication does not create a potential for harm to the general public and is therefore entitled to First Amendment protection. Therefore, I respectfully conclude that this advertisement is properly before the public.

Similarly, I do not believe that the mailing of this advertisement to potential clients violates the precepts of *Bates*, *R.M.J.*, *Stuart* and *Koffler*. Nor can the possibility of invasion of privacy or the possibility of overbearing persuasion, both condemned in *Ohralik vs. Ohio State Bar Association*, 436 U.S. 447 (1978), be sufficiently possible in mail solicitation to justify banning it. As the court in *Koffler* noted, citing *Consolidated Edison Co. vs. Public Service Comm.*, 447 U.S. 530, 542-3, "a recipient of a lawyer's letter may escape exposure to objectional material simply by transferring . . . [it] from envelope to wastebasket."

I similarly conclude, therefore, that a direct mail advertisement system, using the aforesaid yellow page advertisement, is similarly permissible under *Bates* and *R.M.J.* As I have indicated, I have stopped making use of this advertisement pending resolution of this matter. I would, therefore, appreciate your prompt advice herein.

Very truly yours,

SHELDON STEIN

SS/tg
Enc.

DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

May 16, 1983

PERSONAL & CONFIDENTIAL

Sheldon Stein, Esq.
Suite 1226, Standard Building
P.O. Box 5605
Cleveland, Ohio 44101

Re: Legal Service Advertising
MISC. 1983

Dear Mr. Stein:

Please be advised that this office is in receipt of your May 5, 1983, letter with attachments. This office does not have the authority under Gov. Rule V to issue advisory opinions regarding legal service advertisements. Our authority is to investigate and file a formal complaint when there has been a violation of the Code of Professional Responsibility.

This office is not restricted by any actions or advice by the American Bar Association or other states. The Su-

preme Court of Ohio has not amended DR 2-101 and DR 2-102 since the announcement of *Bates v. Arizona* and *In re R.M.J.* by the Supreme Court of the United States, so that the Ohio rules as to legal service advertisements and professional announcements are still in effect in Ohio as enacted subject to those two U.S. Supreme Court decisions.

Furthermore, it is our position that the manner in which your advertisement was sent to Ms. Knapp is a violation of DR 2-103 (solicitation) and DR 2-104 (employment resulting from unsolicited advice). We request that you comply with the current Ohio Supreme Court Rules of Professional Responsibility unless you wish to test the Ohio rules through disciplinary proceedings as provided for in Gov. Rule V.

Please advise this office in writing of your intention to comply with the Code of Professional Responsibility in all of its aspects in carry out your professional responsibilities. Thank you for your anticipated cooperation.

Very truly your,

(AJG)
ANGELO J. GAGLIARDO
Disciplinary Counsel

By: /s/ CARL J. CORLETZI
Carl J. Corletzi, Assistant
Disciplinary Counsel

CJC/sam

SHELDON STEIN
ATTORNEY AND COUNSELOR AT LAW
Suite 1226 - Standard Building
Post Office Box 5606
Cleveland, Ohio 44101

216 696-7449

June 1, 1983

Mr. Carl Corletzi, Esq.
State Disciplinary Counsel
175 South Third Street
Columbus, Ohio 43215

Re: Professional Advertising

Dear Mr. Corletzi:

I am in receipt of your letter of May 16, 1983, in which you again ask the undersigned to advise in writing of my intention to comply with the Code of Professional Responsibility.

At this point, I do not understand your position. Initially, you asked that I examine my advertisement procedures in light of the Code of Professional Responsibility and the recent decision in *Bates vs. Arizona* and *In Re R.M.J.*

In response thereto, I sent you a letter citing case authority for the proposition that my conduct is proper, and indicating that other courts have invalidated similar disciplinary provisions in other states. Furthermore, I pointed out specific language in both *Bates* and *R.M.J.* which cast serious doubt upon the validity of the specific regulations that you claim I have violated. Now you have indicated that I must cease making use of my advertisement for any

purpose whatsoever, apparently ignoring the authority made available to you.

I have no desire to be subjected to disciplinary proceedings and to have to undergo the extreme embarrassment and humiliation that naturally follows. Nor do I wish to have to retain counsel, at considerable expense, in defending such proceedings. Thus, your suggestion that I test the disciplinary code by subjecting myself to a disciplinary proceeding is unacceptable in that it exacts too high a price for exercising my constitutional rights.

[2] Similarly, I will suffer a considerable loss of income if I cease using my yellow pages ad. I feel very strongly about, and believe in, the Constitution and the Bill of Rights, and the whole idea of being subject to punishment and being forced to forego a considerable amount of income solely because I have exercised my First Amendment rights is very upsetting to me.

In sum, I wish to avoid litigation if at all possible, and ask that you reconsider your decision or suggest some other method of resolving this dispute. Any ensuing court action would be costly for all concerned, and would reflect adversely upon the undersigned, your office, and our profession in general. While your office may not have the authority to issue advisory opinions, it is your obligation not to take any action upon which it is known or reasonably should be known, violates rights guaranteed by the Constitution.

Thank you for your consideration in this matter.

Very truly yours,

SHELDON STEIN

SS/tg

DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

June 3, 1983

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

Sheldon Stein, Esq.
Standard Building
Suite 1226
P.O. Box 5606
Cleveland, Ohio 44101

Re: MISC. 1983
LSA

Dear Mr. Stein:

This office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited to investigate alleged violations of the Code of Professional Responsibility and upon determining that cause exists to file a complaint with the Board of Commissioners on Grievances and Discipline.

Your attention is directed to the provisions of Government of the Bar Rule V as promulgated by the Ohio Supreme Court.

Unless you advise this office that you are going to comply with our letters of April 25, 1983 and May 16, 1983 this office will have no alternative but to file a formal complaint against you for the reasons indicated therein.

Please advise this office within five (5) days of receipt of this letter what your intentions are in this matter.

Very truly yours,

/s/ ANGELO J. GAGLIARDO
Angelo J. Gagliardo
Disciplinary Counsel

AJG/ns